STATE OF MICHIGAN

COURT OF APPEALS

VANESSA HILL,

Plaintiff-Appellant,

v

YMCA OF FLINT, MICHIGAN,

Defendant-Appellee.

UNPUBLISHED
October 15, 2013

No. 310418
Genesee Circuit Court
LC No. 11-095443-NO

Before: M. J. KELLY, P.J., and WILDER and FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff fell as a result of a pothole near defendant's outdoor track, sustaining injury. Plaintiff was not a YMCA member at the time of the incident, but the outdoor track where her injury occurred was open to the public. The incident occurred about 20 minutes before sunset on an asphalt surface adjacent to the track. Plaintiff testified that she was looking up ahead, not at the ground beneath her, when she fell. Plaintiff claims that she did not see the pothole, which was roughly eight inches wide and six inches deep, until after she fell.

This Court reviews a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10) de novo. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). "When reviewing a motion for summary disposition under MCR 2.116(C)(10), we review the affidavits, pleadings, depositions, admissions, and documentary evidence submitted by the parties in alight most favorable to the nonmoving party." *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). A motion for summary disposition brought under MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Benton v Dart Props, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006). The duty owed to a visitor by a

landowner depends on whether the visitor was classified as a trespasser, licensee, or invitee at the time of the injury. *Taylor v Laban*, 241 Mich App 449, 452; 616 NW2d 229 (2000).

Plaintiff conceded at the trial court that she was a licensee at the time of her injury.

> [A] landowner owes a licensee a duty to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the hidden danger involves an unreasonable risk of harm and the licensee does not know or have reason to know of the hidden danger and the risk involved. [*Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 65; 680 NW2d 50 (2004).]

Generally, "potholes in pavement are an 'everyday occurrence' that ordinarily should be observed by a reasonably prudent person." *Lugo v Ameritech Corp*, 464 Mich 512, 523; 629 NW2d 384 (2001). Furthermore, "a common pothole . . . is open and obvious and, thus, cannot form the basis of liability against a premises possessor." *Id.* at 520.

In this case, plaintiff argues that the hole was concealed by sand, taking it outside the purview of "open and obvious" condition, and that she saw neither the hole, nor the sand allegedly concealing it, before falling. Viewed in the light most favorable to plaintiff, while the evidence supports plaintiff's contention that there was at least *some* amount of "sand or dirt" in and around the hole when plaintiff encountered it, none of the affidavits submitted by plaintiff specifies the amount of sand or dirt that was present in or around the hole. More importantly, none of the affidavits contains anything to suggest that the sand or dirt somehow made the hole more difficult to see, thereby becoming a "hidden" danger. Defendant, on the other hand, submitted affidavits of three YMCA employees, which provided that the hole was filled with sand *the day after* plaintiff's fall. Lawrence Cushman, the branch executive of that YMCA, stated in his affidavit that he noticed the hole, from about 30 feet away, on the morning of July 12, 2010, which was approximately 12 hours before plaintiff's fall, and instructed employee Rich Engelmann to fill the hole with sand. Engelmann's affidavit stated that he did not have an opportunity to do so that day. John McLaughlin, another YMCA employee, stated that on July 13, 2010, under the direction of Cushman, he filled the hole with sand. McLaughlin noted that the hole was approximately 8 inches wide and 6 inches deep.

A mere possibility that a factual claim might be supported by evidence at trial is insufficient to create a genuine issue of material fact. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). Conclusory allegations that are devoid of detail are insufficient to demonstrate that there is a genuine issue of material fact for trial. *Bennett v Detroit Police Chief*, 274 Mich App 307, 317; 732 NW2d 164 (2006). Having provided no details whatsoever regarding how much sand there was in the hole or even how such sand operated to conceal the hole, plaintiff's conclusory allegation that sand near the hole caused her to fall is insufficient to create a genuine issue of material fact.

Thus, even when viewed in the light most favorable to plaintiff, the assertion that there was sand or dirt on the ground in the area where plaintiff fell is insufficient to create a genuine issue of material fact as to whether the hole in the ground was hidden, rather than open and obvious. Furthermore, regardless of the hole's visibility, plaintiff has presented no evidence to

suggest that the hole, rather than being an "everyday occurrence," presented an unreasonable risk of harm.

Affirmed. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood